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JAMES H. McKENNEY,
Clerk

No. 200.

Brief of Garland & Wright for Appellees.

BRIEF OF APPELLEE.

Filed Dec. 11, 1899.

Supreme Court of the United States.

October Term, 1899.

No. 200.

THE CONSOLIDATED CANAL COMPANY,
Appellant.

vs.

THE MESA CANAL COMPANY,

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

(17,285.)

C. M. Frazier
~~FRAZIER, McCORMICK & WILCOX'N.~~
Rufus C. Garland
W. W. Wright, Jr.
Attorneys for Appellees.

(17,285.)

Supreme Court of the United States.

October Term, 1899.

No. 200.

The Consolidated Canal Company, Appellant,

vs.

The Mesa Canal Company.

The following assignment of error found in the record of this case on page 208, folio 391, notifies this Court why this case is before it:

"In the Supreme Court of the United States.

CONSOLIDATED CANAL COMPANY,
Appellant.

vs.

THE MESA CANAL COMPANY,
Respondent.

Assignment of Errors.
In Equity.
Filed December 23, '99.
Loyd Johnson,
Clerk.

Comes now the appellant and says that in the record and proceedings in the said cause there is manifest error in this, to wit, that upon the facts as they appear in the evidence and as found by the Supreme Court of the Territory of Arizona, the decree of the Court below should have been for the complainant and an injunction should have been granted as prayed in complainant's bill; and there is also error in this , to wit, that by the record aforesaid it appears that the Supreme Court of the Territory ought to have reversed the decree for respondent and directed that an injunction issue as prayed by the appellant, and the said appellant prays that the judgment of the Supreme Court of the Territory of Arizona affiming the judgment of the lower Court may be reversed, annulled, and altogether held for nothing and that the Supreme Court of of the Territory of Arizona be directed to take such action as may be necessary to the end that the appellant may have the relief to which it is entitled.

C. F. Ainsworth and
John D. Pope,
Attorneys for Appellant."

This assignment of error, if such it can be called, complains that upon the facts as they appear in the evidence, and as found by the Supreme Court of the Territory of Arizona, the decree of the Court below should have been otherwise than what it was. There is no assignment of any error of law, or any specific assignment either as to law or fact.

Under rule 21 of this Court, and sections 997 and 1012 of the Revised Statutes of the United States, 1878, this Court has held that the assignment of error made on appeal from the District Court to the Supreme Court of a Territory cannot be accepted on appeal to this Court as an equivalent of the assignment of error required by the statute.

Benites vs. Hampton, 123 U. S. 519.

Under the ruling in Deitsch vs. Wiggins, 15 Wallace, 539, errors, like exceptions in a bill of exceptions, must be specifically assigned.

Black vs. Darling, 140 U. S. 234.

Mining Co. vs. Fraser, 130 U. S. 611.

Phoenix Life Ins. Co. vs. Raddin, 120 U. S. 183.

In Chicago Etc. Co. vs. Moffit, 75 Ill. 524, where the record contained no specific assignment of error, the Court pertinently remarked "counsel must not operate a drag net and ask the Court to do the sorting." As counsel for the appellee, we object to going into the sorting business through the record which contains over 200 pages, and ask that this Court affirm the decision of the lower Court.

Should the Court, however, desire to examine this record for any plain errors that may appear, we desire to submit the following:

STATEMENT.

The Mesa Canal Company was organized in 1878 and completed in 1879 as shown by the testimony of Pomeroy, page 130 and Lewis, page 136. It was one of the first canals built in the valley. The water was located in the Salt River, and the canal was built for the purpose of irrigating lands owned and controlled by the stockholders of the company. The shares of stock were about 300 and never have been increased. From 1878 until 1891 this canal with all its laterals and ditches was operated by the owners of said stock who were users of said water for their own benefit. The main canal extended about 15 miles on the south side of the Salt River in Maricopa County, Territory of Arizona.

On January 10th, 1891, A. J. Chandler, assignor of the Consolidated Canal Company, appellant, entered into a contract with the Mesa Canal Company, which contract is plaintiff's exhibit "A" found on pages 12-13-14 and 15 of the record herein.

This contract provides that A. J. Chandler and his successors shall have forever certain rights and privileges, upon terms and conditions therein expressed, to the upper end of said canal, to wit; fro mthe place where the water was taken from the Salt River down to a point on said canal about 7½ miles below said place designated as the Ayres Head Gate. Among other privileges, he should increase the capacity of said canal, not to exceed 40,000 inches of water, miners' measurement, nor less than 10,000 inches. It it acknowledged that the capacity, at that time, of said canal was 7,000 inches, miners' measurement, and it was agreed that he should deliver that amount of water at the Ayres Head Gate to the stockholders of the Mesa Canal Company, who should own and operate the canal below that point, for the sum of $8.75 per share of stock per year. This enlargement of the size and dimensions and capacity of said canal above said point by appellant, was to be done at appellant's expense, and said agreement provided specifically that it was to be done "*without in any way interfering with the rights, titles, interests or privileges of said party of the first part in and to said canal and the water flowing through said canal, except as hereinafter provided.*"

Appellant took possession under said contract of said portion of said canal, and ever since has been and now is in possession of said portion of said canal, not only to the point designated as Ayres Head Gate, but extended its possession about one half of a mile below said Ayres Head Gate to a point where it established a division gate, as shown by the testimony of many witnesses in the record. Below in appellee's canal appellant established its barley crusher five feet below the surface of the land in that immediate vicinity.

ARGUMENT.

It is apparent that the consideration to be derived from this contract on the part of appellant was the use of the

extra amount of water to be developed and carried in canal above said point mentioned in said contract, and the $8.75 per share that it was to receive from the stockholders of the Mesa Canal Company per year. In order to receive the first, it would be necessary to find purchasers for the extra amount of water developed. It is fair to conclude that this extension of one half of a mile could be for no other purpose than to compel land owners on each side of said canal for miles in each direction to purchase the extra water developed by said appellant. It also explains, as I shall illustrate further along, why at the point where the 7,000 inches of water are delivered, the appellant dropped the water into the canal five feet below the surface of the adjoining land and asked the Court to retain it there, so that at least two miles below said delivery, no water so delivered could be used upon the surface of said land for irrigating purposes.

This water was located for agricultural purposes only; no other use was contemplated or specified between the parties in said agreement. If the appellant raised the grade of said canal by its reconstruction, such elevation should inure not only to the benefit of the Consolidated Canal Company, but also to the appellee. We deny any right or authority under or by virtue of said contract, or by any agreement, for the plaintiff to establish any water power or machinery on or along said canal or at said division gate, and if any such water-power was developed or machinery placed therein, it was without right or authority and against the rights of appellee, and an intrusion and trespass upon appellee so far as it would interfere in any way with the proper irrigation of the lands belonging to the stockholders of the Mesa Canal Company.

It is admitted that appellee maintains a check or dam some 75 or 100 feet below where the water is delivered to them in said canal, and that the water backs up against the water fall and destroys the water power used by ap-

pellant in propelling machinery, but the evidence shows that it was a temporary check or dam for the purpose of forcing water into a lateral ditch in order to irrigate the lands owned and managed by the stockholders of the Mesa Canal which lie under the Mesa Canal below the division gates. The evidence shows that said check was reasonable in height, and was necessary to properly irrigate the lands of said defendant stockholders, and that appellee in putting in said dam, in no way violated the contract between the parties hereto, and was thereby enabled to use the water upon the lands upon which it had originally been used before said contract was entered into and for which the water was originally appropriated from the Salt River.

(Folios 250, 257 and 265).

The record shows that on the 11th, 12th and 14th days of December, 1896, this case was tried before his honor, A. C. Baker, Judge of the Third Judicial District of this Territory and Chief Justice of the Territory, and submitted to the Court, and on the first day of March, 1897, the Court being fully advised in the premises, and after having personally inspected said canal system at and adjacent to the division gate and water power connected therewith, said Judge denied an injunction as prayed for in the complaint and decreed that plaintiff take nothing by his action. (Page 16, folio 30 of record.)

The testimony of W. A. McDonald, found on page 171 of the record, as well as the testimony of many other witnesses, both for the plaintiff and the defendant, in the Court below, would tend to show that the water wheel and power put in below the division gate in that part of the canal controlled by the appellee, was of no practical use, of little value and worthless in every respect for the purpose for which it was constructed, and that it was a pretext for the appellant to prevent the use of water on the surface of the lands in that vicinity. Whether this is true or not, it is immaterial so far as the right of appellee to use the water at the level at which the delivery is made is concerned. It is stipulated in the agreement between the

the parties hereto that before the appellant is entitled to receive or use any water through the canal, it must deliver the 7,000 inches of water to appellee. It expressly denies to the appellant any right to the use of this water either to turn wheels, irrigate lands, or for any other purpose until it is delivered, and we take it that after it is delivered appellant has no authority or right to use it.

The evidence shows that the water had been raised by the check complained of, not five feet, or to the level of the water above the division gate, but about 3½ feet, not to the level of the water remaining in appellant's canal at that point. It strikes us as being fair and equitable that the water should be delivered to the Mesa Canal Company at the elevation of the enlarged canal at the point of delivery.

His honor, Associate Justice Doan, in rendering the opinion of the Supreme Court of the Territory of Arizona in this case on this point, uses the following language: (Folio 369)
"While the appellee might not be able to compel the delivery at such elevation without express agreement, it would be unjust and inequitable without an express stipulation to that effect in the agreement, to compel the appellee to not only receive its water, but to continue to use it at an elevation five feet lower than the rest of the water that had been carried that far in the same canal, simply to accelerate the flow of water and thus increase the carrying capacity of the canal in the interest of the other contracting party. The slight difference thus caused in the carrying capacity of the appellant's canal would seem to have been properly held by the lower Court to be insufficient grounds to justify in the proper and advantageous use of the water in its own canal by appellee, since the elevation to which it was thus raised did not exceed the level at which it had been carried to this point in the canal which was the common carrier for the water of both parties."

The plain question in this case is this: Are the stockholders in the Mesa Canal to be compelled to receive water at a level that makes it worthless to them, water which they paid appellant for the delivery of, water which they have located and developed and have been using since 1878, and the title to which they have sacredly guarded by night and day all this time? We think not. If that were true, owners of canals, by putting in water wheels at places of delivery of water to water consumers and stockholders, could deliver water at a lower level than the surface of the lands in that immediate vicinity, and compel consumers either to purchase water from them at another point or abandon their farming lands. No authorities are cited in support such a theory, and I apprehend no court would promulgate such a doctrine by such decision.

Our Arizona statutes, general section 3203, provide that the right to use water appropriated from the natural streams of the Territory for irrigation purposes shall be preferable to all others. Whether this statute is in conformity with the United States law or not, the legislatures of the Territory recognize water appropriations from natural streams in a broad sense for irrigating purposes. In this particular instance it is appropriated for that purpose and no other. It still flows through the Mesa Canal to the stockholders and water consumers who originally appropriated and located said water, and such users, I maintain, have the right to receive the water so appropriated at a level that will efficiently water their lands. And I maintain that if the division gate of the Consolidated Canal Company is too low, and the grade of the ditch above it is too low to allow the stockholders of the Mesa Canal Company to get the proper service at a proper level for the land they irrigate, a Court of Equity should, upon proper application, compel the Consolidated Canal Company to elevate the division gate to a proper level and grade their ditch in conformity thereto so that the water could be used effectively by such appropriators.

W. A. McDonald testifies on page 171, folio 321, that after the land of A. J. Chandler was condemned and the new Mesa ditch constructed, the directors met at the division gates with A.J.Chandler and proposed to the Consolidated Canal Company to put a flume in above the division gates to supply their lateral ditch with the water they paid the Consolidated Canal Company for delivering, and his testimony is not disputed as to that point, so that the alleged water power might be preserved. This proposition A. J. Chandler on behalf of the Consolidated Company flatly refused. This testimony alone should be sufficient to this Court, to affirm the decision of the Courts below which denied the appellant the injunction prayed for. It does away with the theory of the usefulness of the machinery placed by the appellant below the division gates and its practical utility unless it be upon the theory that it served a practical purpose, in compelling appellee to receive water at a level which made it impossible to use it upon their lands except they put in pumping plants along their canal below the division gates.

Dams and checks along water-courses are the only means by which water is turned from its regular channel and utilized. If all checks and dams were taken out of streams, canals and ditches irrigations would cease. Checks and dams are absolutely necessary in all systems of irrigation, commencing with the dam in the river where the water is originally located and turned from its natural course to the bordered lands in the cultivated fields. The appellee used no unusual means in putting in the check complained of to get its water on its land—the common and usual means of all irrigation.

The questions of fact which were determined by the trial judge in this case and either determined by the lower Court in favor of the appellee or such issues as were determined to be immaterial to the trial of this case, I apprehend this Court will not be disposed to disturb.

Finally we conclude that the Consolidated Canal Company undertook to compel the stockholders owning lands in the vicinity of the division gates of its canal to buy water from them instead of using the water they had already purchased from appellant, and failing to convince the lower Court of this most remarkable equity which it has so persistently claimed in the lower Courts, it now appeals to this Court for redress. We submit that the record of this cause shows both the trial Court and the Supreme Court below to have been both careful and just, and that ample reasons were presented to them for denying the injunction, and we ask that the judgment of the Supreme Court of the Territory of Arizona be affirmed.

Most respectfully submitted,

C. M. FRAZIER ~~and~~
~~FRAZIER, McCORMICK & WESCOTT,~~
~~Attorneys for Defendant and Appellee.~~
Rufus C. Garland
W. W. Wright, Jr.
Attorneys for Appellee